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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MORRIS RONALD GOULD a/k/a RONALD GOULD,

Petitioner,

v.

FLORIDA BAR, JOHN F. HARKNESS, JR., EXECUTIVE DIRECTOR, FLORIDA BAR, JACQUELYN P. NEEDELMAN, FLORIDA BAR COUNSEL, BARBARA PARIENTE, CHIEF JUSTICE OF THE SUPREME COURT OF FLORIDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MORRIS RONALD GOULD, Pro Se
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Miami Beach, Florida 33141
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QUESTIONS PRESENTED

1. Is it a violation of Petitioner's and Florida consumers' First and Fourteenth Amendment rights for the Bar to totally ban Petitioner's advertisement "New York Legal Matters Only. M. Ronald Gould Licensed New York Attorney 1201 Brickell Avenue, Ste. 630 Miami, Florida 33131. Free phone consultation 305 865-2962" because the Bar holds, that pursuant to the advertisement, it is the "unlicensed practice of law" if consultations take place at a person-to-person meeting at Petitioner's Miami office?

2. Should the *Central Hudson Gas & Elect. Co. v. Public Service Comm'n* holding apply to lawful and truthful attorney's advertised offering of legal services where those legal services are a direct benefit to the general public?

3. Does the Eleventh Circuit's decision conflict with the Third Circuit's holding in *Surrick v. Killion*?

4. Does the Eleventh Circuit's decision obstruct Petitioner's and all other lawyers federal license to practice before federal administrative agencies and conflict with federal law and policy?

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PETITION FOR A WRIT OF CERTIORARI

Gould petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Court of Appeals' opinion (App. 1-6) is an unpublished opinion. The district court's opinion (7-16) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 12th, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The United States Constitution First Amendment and Fourteenth Amendment. The Administrative Procedure Act, 5 U.S.C. §§ 500, 500(b). United States Code, 28 U.S.C. § 2343. R. Regulating the Florida Bar, 3-4.1, 4-5.5(b), 4-5.5(c)(4), 10-2.1, 10-2.1(a), App. 25-29.

STATEMENT

BACKGROUND - THIS CASE

Petitioners original charges were that the Respondents had violated and are violating his federal constitutional rights as they apply to him: 1) the equal protection clause of the Fourteenth Amendment; 2) the First Amendment; 3) the Full Faith and Credit Clause in Article IV, § 1; 4) the Commerce Clause in Article 1, § 8, Clause 3; 5) violations of 42 U.S.C. § 1983; and 6) 42 U.S.C. § 1988.

> "First Amendment, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

> "Fourteenth Amendment, Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive of any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

On December 20, 2004. Petitioner filed a fourteen count Complaint for declaratory and injunctive relief

relying on 28 U.S.C. §§ 1331, 2201, and 2202 for jurisdiction. Petitioner brought this action charging the unlicensed practice of law (UPL) rules as applied to Petitioner violated his constitutional rights. Pursuant to a 12(b)(6) motion, 11 counts were dismissed and one count dealing with a disclaimer was mooted out because Petitioner was already using the disclaimer "Admitted New York Bar Only," leaving only two counts, both of which allege violations by the Florida Bar of Petitioner's First Amendment rights as applied to Petitioner.

Motions for Summary Judgments and cross motions were filed under Fed. R. 56 relating to the two remaining First Amendment issues, which were decided by the district court on August 8, 2006 granting a final order of Summary Judgment for the Bar and denying Petitioner's motion.

The Eleventh Circuit held that Petitioner's advertisement "NEW YORK LEGAL MATTERS ONLY, M. RONALD GOULD LICENSED NEW YORK ATTORNEY 1201 BRICKELL AVENUE, STE. 630, MIAMI, FLORIDA 33131 FREE PHONE CONSULTATION 305 865 2962" concerns unlawful and untruthful activity. It is the unauthorized practice of law (UPL) because Gould, though licensed in New York, is not licensed in Florida. *See* Fla. Stat. § 454.23 (2004), App. 4, R. Regulating the Florida Bar 4-5.5(b), App. 1-6, R. Regulating the Florida Bar 10-2.1, R. 10-2.1(a), App. 1-6, provides that any person not admitted to the Florida Bar may not practice law in Florida. A person not admitted to the Florida Bar may not

open a law office to practice law, unless authorized by another law.

The Eleventh Circuit's opinion also found that Petitioner's advertisement "Practice Limited to Federal Administrative Law call M. Ronald Gould, Licensed New York Attorney, 1201 Brickell Avenue, Ste. 630, Miami, Florida 33131 Free Phone Consultation 305 865 2962" "is misleading and relates, at least in part, to unlawful conduct. Not protected by the First Amendment and is subject to regulation by the Florida Bar."

The Circuit Court gave as its reason for the advertisement to be unlawful is that "The words 'federal administrative law' apply to a broad range of legal issues, and are not limited to the representations of persons before federal agencies. Issues of federal administrative law arise in state and federal courts, as well, as before federal agencies."

ARGUMENT

REASONS FOR GRANTING THE PETITION

1. **It will provide for the delivery of legal services, not now available, to consumers living in Florida who have legal problems arising in New York. It will allow licensed attorneys from New York to establish offices in Florida so that the advice and representations regarding New York law will be cost effective and convenient to the public.**

2. **The Eleventh Circuit's decision is in conflict with the Third Circuit's holding in *Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006), by improperly restricting a lawyer's federal license to practice before federal administrative agencies. Failure to resolve the conflict; the Eleventh Circuit's decision may be a basis to prohibit lawyers licensed in one jurisdiction from practicing before federal administrative agencies located in a jurisdiction from which the lawyer is not licensed.**

3. **The Eleventh Circuit's decision is in conflict with the Administrative Procedure Act (APA), 5 U.S.C. § 500(b) which is the exclusive authority governing lawyers' right to appear before federal administrative agencies.**

1. IT IS A VIOLATION OF PETITIONER'S AND FLORIDA CONSUMERS' FIRST AND FOURTEENTH AMENDMENT RIGHTS FOR THE BAR TO TOTALLY BAN PETITIONER'S ADVERTISEMENT

A. Florida Consumers Are Unnamed Petitioners

Petitioner in bringing this cause of action in the United States District Court and through the appeal process to the Eleventh Circuit has maintained Petitioner is a proper party to advocate the First Amendment rights of consumers. *See Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), *Eisenstadt v. Baird*, 405 U.S. 438, 445 n.5 (1972) and *Carey v. Population Services International*, 431 U.S. 678 (1977).

This case concerns the relationship between the Petitioner and Florida consumers where the First Amendment rights of both are dependent on each other. Petitioner has the right to advertise his offer of New York legal services, and the consumers have the right to read and effectively obtain the consultations and representation on a cost effective basis at a Florida location convenient to the consumer. One without the other defeats the First Amendment rights of both.

The Petitioner and the consumers are attacking the UPL rules as applied to them. Specifically, it is the UPL rules which prevent the Petitioner from

offering New York legal services from Petitioner's Miami office. And indirectly, but in a very practical way, consumers are deprived of those legal services because they are not able to meet with Petitioner in Florida. These UPL rules violate consumers' right to assemble. UPL rules prohibit them from receiving consultations and the preparation of legal documents, much of which would involve litigation in the New York State Courts and directly burdens consumers' right to petition the government for a redress of grievances. Access to New York Courts cannot be accomplished without the assistance of a New York lawyer.

B. Florida Consumers' First And Fourteenth Amendment Rights Are Fundamental And Deserving Of Strict Scrutiny Standard Of Review

The consumers' freedom of speech is dependent on their right to assemble (with Petitioner) and their right to access the courts (need for legal assistance). When these rights in the aggregate are violated by the Bars' use of the UPL rules denying the consumers their choice of counsel, these rights are elevated to fundamental rights separate and apart from the Petitioner's commercial speech rights. "A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest." *Brotherhood of Railroad*

Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964).

Thomas v. Collins, 323 U.S. 516 (1945) upheld the right of private parties to free speech, assemble and to petition for a redress of a grievance. This Court at p. 530:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceable to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights (citation omitted) and therefore are united in the First Articles assurance. CF. 1 Annals of Congress 759-760.

The "right of the people to petition the government for a redress of grievances" was recently addressed by Justice O'Connor writing for the Court in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002) at pp. 524-525:

> The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." We have recognized this right to petition as one of the most precious of "the liberties safe guarded by the Bill of Rights," [*United*] *Mine Workers* [*of America*] *v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967), and have explained that the right is implied by the very idea of a government,

republican in form, *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

The "right of the people" applies to individuals just as it applies to unions, *United Mine Workers, id.*, social action groups, *Roberts v. United States Jaycees*, 468 U.S. 609 (1983), political action groups, *NAACP v. Button*, 371 U.S. 415 (1963), and to corporations, *BE & K Construction Co., id., California Motor Transport Co. v. Tracking Unlimited*, 404 U.S. 508, 511 (1972); *Roberts, id.*, at p. 618:

> In another set of decisions, the Court, has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment-speech, assembly, petition for the redress of grievances, and the exercise of religion. The constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

The American Bar Association's ABA Journal of December 2005 at p. 6, President's Message, "COURT ACCESS SHOULD NOT BE RATIONED," President Michael Greco commented as follows: App. 32 A.R. doc. 52, p. 38:

> No one in our nation should have to go to court unassisted when facing a problem that could result in loss of shelter, family dissolution or serious adverse health consequences. Americans should not be subject to grievous harm at the hands of a legal system that they cannot navigate or even understand

> on their own. If we are to meet the goal of equal justice for all, such critically important legal assistance cannot be rationed by the teaspoonful. Nor should it be subject to long waiting lists, limited capacity and narrow legal aid priority lists that increasingly are based on a triage approach. The importance of insuring access to legal services and to justice for the most vulnerable in a democratic society cannot be overstated. The ability of an individual to address civil legal needs with the help of a lawyer can make the difference between stability and poverty, between hope and despair.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) at p. 643.

> Justice White, writing for the majority:
>
> Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. We cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. *Bates v. State Bar of Arizona*, 433 U.S. at 376.
>
> That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by

denying its citizens accurate information about their legal rights.

The Bar's UPL rules deny the consumer their First Amendment right because they cannot take advantage of the offer of legal services which are lawful and truthful. It is of the utmost importance that the consumers receive the legal services out of the Miami office because it is the most cost effective delivery of legal services. Attorney advertising not only provides information about legal services to lower-income families but also provides greater access by reducing fees. The Federal Trade Commission's 1984 study found that the types of civil legal services most likely to be needed by lower-income households cost 5 to 13 percent more in states with restrictive attorney advertising rules than in states with liberal rules. *See* FTC, Cleveland Regional Office and Bureau of Economics, Report of the Staff to the FTC, "Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising" 77-117 (Nov. 1984).

The UPL prohibits consumers from meeting with Petitioner in Florida to consult on New York legal matters. *See* Fla. Bar Rule R. 4-5.5. This translates into a denial of their choice of counsel, and to the right of access to New York Courts. Access to the courts is a fundamental right which requires strict scrutiny as the standard of review.

C. Attorney's Offer Of Legal Assistance "Deserves The Strongest Protection Our Constitution Has To Offer"

From *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) at p. 376; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 at 643 (1985) and to the *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), this Court has consistently held that attorney advertising is commercial speech though having some measure of First Amendment protection but not deserving of full protection.

Advertising is the most informative method of communication. It has provided commercial speech which helps millions of people every day to avoid products which have been declared or suggested are not safe. It announces to the public with certain illnesses that they may be selected to participate in controlled trials for medications to cure or reduce the effects of certain medical conditions. Announcements that free trials are being conducted in the name of preventive medicine is an everyday occurrence.

Lawyers advertise every day announcing that products are under investigation or have been determined to cause illnesses or are unsafe and providing the phone numbers to consumers for more information on their legal rights. This type of information is not normally available to the public. These messages are beyond commercial speech. They inform the public at large of vital information. It's the equivalent of a public service announcement.

Petitioner's offer of New York legal services "deserves the strongest protection our constitution has to offer." Justice O'Connor, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 at 634 (1995): New York residents move to Florida in unusually large numbers. They may still have family or business ties which do or may require legal assistance. That type of assistance is not available from Florida Bar members who are not admitted to practice in New York. *See* App. 30-31 A.R. doc. 52, p. 36. It is neither convenient nor cost effective for Florida consumers to spend large sums of money on travel to New York to meet with a New York lawyer and which may require a number of occasions. The consumers most likely in need of legal services are blue collar workers who cannot take days off from their employment or retirees on a fixed income who cannot afford extra expense beyond the cost of legal fees. Cost effective legal fees without the added burden of travel expenses will make the difference for many consumers of protecting their legal rights. *See* FTC Report, Cleveland Regional Office Report, *id., VA St. Bd. of Pharm. v. VA Cit. Cons. Council*, 425 U.S. 748 at 754 "that First Amendment interests in the free flow of price information could be found to outweigh the countervailing interests of the States." Providing cost effective legal services is surely as worthy a goal as the price of prescription drugs. The UPL rules should be struck down for it is the rules which prohibit the consumers' right to cost effective and convenient delivery of legal services.

This Court with great concern has separated noncommercial speech from commercial speech for fear that granting full First Amendment protection to commercial speech would dilute noncommercial speech. Noncommercial speech includes talk of religious, social, and political issues. Peaceful demonstrations and picketing charging government with wrongdoing is fully protected. It is these latter areas of First Amendment rights which require expressive conduct and are most in need of protection. For it is this conduct that is most resisted by governmental authority and quite often results in refusals of permits; or physical restraint during demonstrations. It is the citizens' fundamental right to petition the government for a redress of grievances. But lawyers hold the key to the courthouse door.

Justice Kennedy writing the dissenting opinion in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 at 636 (1995):

> Attorneys who communicate their willingness to assist potential clients are engaged in speech protected by the 1st and 14th Amend. That principle has been understood since *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Justice Kennedy continues at p. 636:

> a preliminary observation is in order. Speech has the capacity to convey complex substances, yielding various insights and interpretations depending upon the identity of the listener or the reader and the context of its

> transmission. It would oversimplify to say that what we consider here is commercial speech and nothing more, for in many instances the banned communication may be vital to the recipients right to petition the courts for a redress of grievances. The complex nature of expression is one reason why even so-called commercial speech has become an essential part of the public discourse the 1st Amend. secures. If our commercial speech rules are to control this case then it is imperative to apply them with exacting care and fidelity to our precedents, for what is at stake is the suppression of information and knowledge that transcends the financial self-interest of the speaker.

Justice O'Connor writing the majority opinion, *id.*, at p. 634 (dictum):

> Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our constitution has to offer.

(Citations omitted.)

The attorneys' commercial speech cases that have come before this Court can for the most part, be separated into two classifications. The following cases relate to the lawyers advertising some kind of designation to impress the public. *Peel v. Atty. Registration and Discipline Comm. of Illinois*, 496 U.S. 91 (1990), upheld specialty certification, *Ibanez v. Florida Dep't of*

Professional Regulation, 114 S.Ct. 2084 (1994) allowing multiple certificates and licenses to appear on their letterhead, *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), upheld the right of accountants to solicit business on a person-to-person basis because the accountants brought important financial information to business people. This Court struck down on First Amendment challenges most, if not all, of the different rules of professional conduct which totally banned speech on the grounds that the Bar failed to comply with *Central Hudson Gas & Elect. v. Public Service Comm'n*, 447 U.S. 557 (1980). These cases related to speech alone and were not coupled with any of the other First Amendment rights.

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1991), striking down rules of ethical conduct which burdened the right to petition; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), advertising to the public that there is evidence that the Dalkon Shield has caused injury and that a claim must he filed by a certain date; *NAACP v. Button*, 371 U.S. 415 (1963), offer to represent black citizens to gain certain political rights; *United Mineworkers of America v. Illinois State Bar Association*, 389 U.S. 217 (1967), providing attorneys who will represent union members for accident claims where the legal fees are cost effective; *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), the right of a corporation to petition the government for a redress of a grievance; *Roberts v. United States Jaycees*, 468 U.S. 609 (1983), right of association. The

common denominator of these cases is that they all involved commercial speech and one or more other First Amendment rights. In each of these cases it is the public's right of access to the courts which was of paramount importance.

Brotherhood of Railroad Trainmen v. Virginia, ex rel. Virginia Bar, 377 U.S. 1 (1964), "A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest."

The First Amendment is binding on the states by application of the Fourteenth Amendment. A "citizens right to petition the government for a redress of grievances" is not limited to suits against the United States but includes lawsuits against the State of New York.

Zauderer, id., at 643, Justice White referencing to the public's access to the courts: "The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights."

Upon the founding of the Republic our government established the judiciary, of which the courts are involved in the daily life of the public, more so, than any other branch of government. Our court system, by design is so complex that only persons with at least seven years of higher education, tested on some minimal form of knowledge has a chance to

work within the system but not with efficiency or competency. To be competent and efficient you must add a number of years of practical experience of appearing in court.

We have crowned the lawyer as the keeper and defender of the public's rights. Justice Kennedy for the minority stated "that an offer of legal assistance was not merely commercial speech," Justice O'Connor for the majority: "attorney's offer of legal assistance deserves the strongest protection our constitution has to offer." *Florida Bar v. Went For It, Inc., id.* The speech at issue is lawful, truthful and directly serves the public interest. It should be elevated to noncommercial speech.

If not noncommercial speech, then it should be elevated to the most respected position in commercial speech with strict scrutiny as the standard of review.

D. *CENTRAL HUDSON, ID.*, SHOULD NOT APPLY TO PETITIONER'S ADVERTISED OFFER OF LEGAL ASSISTANCE

Central Hudson's holding, *id.*, should not apply because Florida consumers are legal users of New York legal services and New York legal services are lawful and truthful provided that the consumers do not have access to those services from a Florida law office. The Bar wants to keep the consumer in ignorance so that they do not know about the availability of Petitioner's offer of New York legal services or make the legal services unavailable to the public.

44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996) at p. 1516, Justice Thomas:

> In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (citations omitted) (1980), should not be applied in my view. Rather, such an "interest" is per se illegitimate and can no more justify regulation of "commercial" speech than it can justify regulation of "noncommercial" speech.

E. The State Of Florida Has No Substantial State Interest In Banning The Offer Of New York Legal Services To Consumers From A Florida Law Office

The Florida Bar wrote a letter advising the Petitioner that his advertisement with a New York address is lawful and truthful, "provided that you do not give advice while here in Florida." It is the UPL if the other proposed advertisement with a Miami address is published. App 25-26 A.R. Doc. 52 at pp. 32-33-34. It is not the law Petitioner practices but where he practices the law that is the basis for a UPL. The Bar cannot ban the practice of New York law based on advertisements where the contents are substantially the same except for the Miami office address. The Bar has no problem allowing personal meeting by consumers at Petitioner's New York

address. The Bar finds no fault for Florida consumers to manage their case by phone, fax and e-mail. If the Bar allows Petitioner to obtain Florida consumers as clients, whether accomplished by phone or mail, then it stands to reason that the Bar does not find any harm for Petitioner to give advice on New York law to Florida consumers. *See Florida Bar v. Moses*, 380 So.2d 412 (Fla. 1980) at p. 417.

This Court has stressed the importance to consumers who would be applying for patents that patent agents or lawyers have offices in the area from which their clients reside or have an office. *Sperry v. The Florida Bar*, 373 U.S. 379 (1963) at pp. 384-385:

> The bulk of practitioners are now scattered throughout the country, and have been so distributed for many years. As a practical matter, if practitioners were not so located, and thus could not easily consult with the inventors with whom they deal, their effectiveness would often be considerably impaired.

Recently the Third Circuit in *Surrick v. Killion*, 449 F.3d 520 (2006) at p. 533, dealt with the same issue, and *citing Sperry*, *id.*:

> Accordingly, the question is not whether any federal law expressly confers the right to maintain an office, but whether the maintenance of an office is "reasonably within the scope" of the federally-conferred license to practice law. *Id.* at 402 n. 47, 83 S.Ct. 1322.
>
> . . . we agree with the District Court that maintaining a law office is "reasonably

> within the scope of the practice authorized" by 28 U.S.C. sections 1654 & 2071 and the local rules and that the state's regulation of such conduct hinders Surrick's federal license to practice law.

Here, the District Court heard expert testimony on the ability of an attorney to practice law without a physical office and concluded that:

> . . . despite technological advances in the practice of law – such as electronic filing and case research through Internet subscriptions – physical space remains necessary for the representation of clients. A physical office space provides a location for confidential counseling with clients as well as room to store the necessary equipment, such as fax machines, legal texts, telephones, paper files, typewriters and computers, association with proper management of legal maters [sic]. Without a physical office location the plaintiff would be effectively prohibited from "performing those tasks which are incident to" litigating cases before the Eastern District.
>
> We agree with these findings. As both a practical and historical matter, the maintenance of a law office is incidental to the practice of law. Although there is no precise formula for determining when a state regulation goes too far in burdening federal goals, *see NW Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 515-519 (observing that some burden on federal goals does not result in preemption), the direct effect of a state

> regulation (fn.5) prohibiting an attorney from maintaining a law office is the frustration of his or her ability to practice before a federal court. Accordingly, we respectfully disagree with the Pennsylvania Supreme Court, and conclude that the Eastern District of Pennsylvania's power to determine who may practice law before it preempts Pennsylvania law barring an unlicensed attorney from maintaining a law office.

We are not dealing with a federal license as in the above cases. We are dealing with the consumers' right to have legal services at the place most cost effective and convenient to where the consumers live. This consumer concern overrides the Bar's UPL. The UPL serves no substantial state interest because once the practice of New York law is conceded to be lawful and truthful it becomes unreasonable and protectionist to bar it from the Miami office:

> *In re Amendments To The Rules Regulating The Florida Bar And the Florida Rules of Judicial Administration*, 907 So.2d 1138 (Fla. 2005) at pp. 1156-1157 "(c)(4) Authorized Temporary Practice by Lawyers Admitted in Another United States Jurisdiction, (A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice or (B) arise out of or are reasonably related to the lawyers practice in a jurisdiction in which the lawyer is admitted to practice." App. 17-18-19 Exemption from the UPL. *See* R. 4-5.5(c)(4).

Ch. 16, R. Regulating Fla. Bar 16-1.1 "Purpose" Foreign legal consultancy rule. (FLC) App. 24:

> The purpose of this chapter is to permit a person who is admitted to practice in a foreign country as an attorney, counselor at law, or the equivalent to act as a foreign legal consultant in the state of Florida. This chapter authorizes an attorney licensed to practice law in 1 or more foreign countries to be certified by the Supreme Court of Florida, without examination, to render services in this state as a legal consultant regarding the laws of the country in which the attorney is admitted to practice.

Exemption from the UPL rules for foreign lawyers. They are allowed to advertise their availability to provide legal services concerning the country from which they are licensed and such services may be performed from their Miami office. Foreign lawyers have all the rights of free speech, right to assemble, and allows the foreign lawyer to prepare legal documents. Both rules allow sister state and foreign lawyers the right to practice the law of their jurisdiction temporarily and permanently in Florida.

The FLC are allowed to use a public forum to advertise their legal services to the public and meet with consumers at their Florida office. But the UPL denies Petitioner the same forum to advertise his offer of legal services and dispense those services from his Miami office. This type of selectivity is unconstitutional on First Amendment challenges and

has been upheld by this Court. The two advertisements are content based but make an impermissible distinction between the New York and Miami addresses. The offering of legal service is lawful and the consumers are lawful users of the service.

The holding in *Carey, States Attorney of Cook County v. Brown, et al.*, 447 U.S. 455 (1980) at p. 457, Mr. Justice Brennan for the Court:

> At issue in this case is the constitutionality under the First and Fourteenth Amendments of a state statute that generally bars picketing of residences or dwellings, but exempts from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute."
>
> At p. 460:
>
> Nor can it be seriously disputed that in exempting from its general prohibition only the "peaceful picketing of a place of employment involved in a labor dispute," the Illinois statute discriminates between lawful and unlawful conduct based upon the content of the demonstrator's communication.
>
> At pp. 462-463:
>
> Any restriction on expressive activity because of its content would completely undercut the "national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270."

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is a 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone.

The Bar's UPL rules should be struck down, as applied to Petitioner.

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980) ("*Central Hudson*") allows the state to regulate (but not totally prohibit) lawful and truthful speech. The state has regulated the conduct of all Florida bar members, sister state and foreign lawyers which satisfies the state interest in protecting the public. *See Florida Bar v. Moses, id.*

In Re Amend. To Rules Regulating Fla. Bar, 907 So.2d 1138 (Fla. 2005) at p. 1153, Rule 3-4.1 NOTICE AND KNOWLEDGE OF RULES; JURISDICTION

OVER ATTORNEYS OF OTHER STATES AND FOREIGN COUNTRIES:

> Every member of the Florida Bar and every attorney of another state or foreign country provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies.

If Petitioner practiced New York law out of his Miami office he would be subject to the same rules of conduct that all lawyers are subject to which satisfies the reason for the UPL rules. *See Florida Bar v. Moses*, 10.

Central Hudson, id., provides:

> The four-prong test that any governmental entity must satisfy before it can restrict commercial speech is:
>
> (1) If the communication is neither misleading nor related to unlawful activity, . . .
>
> (2) The government must assert a substantial interest, and the limitations on expression must be designed carefully to achieve the government's goal. Compliance with this requirement may be measured by two criteria:
>
> (3) the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose;

> (4) if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

The Petitioner's advertisement is lawful, truthful and directly serves the public's interest. The burden is upon the Bar to prove that (1) its interests are substantial; (2) the total ban of providing New York legal services from Petitioner's Miami office advances these interests in a direct and material way; and (3) "the extent of the restriction on protected speech is in reasonable proportion to the interests served, *Edenfield v. Fane, id.*

The Bar has not advanced any reason why the public should be protected from Petitioner's advice on New York law. The second prong has not been satisfied. The Bar by allowing non-Florida Bar members to practice the law of their licensed jurisdictions while residing in Florida renders the UPL rules ineffective and remote, as applied to Petitioner. The Bar has failed to satisfy the third prong. The Bar's regulation of the conduct of all lawyers in Florida has provided the public with protection from Petitioner's offer of legal services. The total ban on Petitioner's advertisement violates the fourth prong. The Bar has not carried its burden required under *Central Hudson, id.*

The Consumers have nowhere to go to obtain New York legal service. Florida lawyers not members of the New York Bar could be found guilty of the UPL

if they offer advice or representation on New York legal matters. App. 30-31 A.R. doc. 52 at p. 36.

The Consumers' right to petition the government for a redress of grievances overrides any substantial state interest and therefore the UPL rules must fall.

2. THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION CONFLICTS WITH THE APA, 5 U.S.C. § 500, *et seq.* AND 28 U.S.C. § 2343

The Eleventh Circuit Court of Appeals held Petitioner's proposed advertisement "Practice Limited to Federal Administrative Law," is misleading at least and relates, at least in part, to unlawful conduct. "The words federal administrative law apply to a broad range of legal issues, and are not limited to the representation of persons before federal agencies. Issues of federal administrative law arise in state and federal courts, as well as before federal agencies." App. 4-6.

Former Chief Justice Rehnquist writing for the majority in *Buckman Co. v. Plaintiffs Legal Committee*, 531 U.S. 341 (2000) at p. 349:

> To the contrary, the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law. *Cf. Boyle v. United Technologies Corporation*, 487 U.S. 500, 504-506 (allowing preemption

of state law by federal common law where the interests at stake are "uniquely federal" in nature.

A party seeking a benefit or an aggrieved party may only seek relief from the federal agency that has authority over the issues. No person can originate a cause of action for federal agency relief in a state court.

United States Circuit Courts of Appeals have jurisdiction to hear cases from federal administrative agencies when exercising judicial review only from final orders of any administrative agency or where by regulation the agency requires an internal agency review. *See Darby, et al. v. Cisneros, Secretary of Housing and Urban Development, et al.*, 509 U.S. 137 (1993). Petitioner is admitted to the Eleventh Circuit. Petitioner may be admitted to any of the Circuit Courts of Appeals.

Whatever reviewing authority the court has, it is limited to a "review of the whole record or those parts of it cited by a party" *See Darby, id.*

Chapter 158 Federal Agency Orders, 28 U.S.C. § 2343 Venue: "The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit."

The Eleventh Circuit refers to "federal administrative law applies to a broad range of legal issues,"

whatever, those legal issues are they must be raised and resolved within the framework of the federal agencies' regulations during the course of a hearing.

3. THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION CONFLICTS WITH THE THIRD CIRCUIT COURT OF APPEALS DECISION

Petitioner's federal license to practice before federal administrative agencies allows representation even if state law issues are involved. *See Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006). Surrick, a member of the Circuit Courts Bar, intended to practice before the Eastern District of Pennsylvania representing litigants in diversity cases, though suspended by his regulatory authorities in Pennsylvania. The Court at p. 531: "(State law concerns are the foundation of federal diversity actions)." The court held that under the Supremacy Clause, "when state law conflicts or is incompatible with federal law, the federal law preempts the state law." The Eleventh Circuit Court's holding intrudes on an area solely within the province of federal administrative agencies. *See Sperry v. Florida, id.*; *Surrick v. Killion, id.*; *In Re Desilets*, 9 F.3d 925 (6th Cir. 2002); *Augustine v. Dept. of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005); 5 U.S.C. § 500(b).

CONCLUSION

The Court is respectfully urged to reverse the decision below, and declare the unlicensed practice of law rules as applied to Petitioner, a violation of Petitioner's and consumers' First Amendment rights.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-15142

D. C. Docket No. 04-23178-CV-FAM

MORRIS RONALD GOULD,
a.k.a. Ronald Gould,

Plaintiff-Appellant,

versus

FLORIDA BAR, JOHN F. HARKNESS, JR.,
Executive Director, Florida Bar,
JACQUELYN P. NEEDELMAN,
Florida Bar Counsel,
BARBARA PARIENTE,
Chief Justice of the Supreme Court of Florida,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 12, 2007)

Before ANDERSON and PRYOR, Circuit Judges, and ALBRITTON,* District Judge.

PER CURIAM:

Morris Ronald Gould, an attorney licensed in New York but not in Florida, appeals *pro se* the summary judgment entered in favor of the Florida Bar; John F. Harkness Jr., Executive Director of the Florida Bar; Jacquelyn Plasner Needelman, counsel for the Florida Bar; and Barbara J. Pariente, Chief Justice of the Supreme Court of Florida, and against Gould's complaint for declaratory and injunctive relief based on his "genuine and credible fear" that he would be charged with unauthorized practice of law in violation of his First Amendment right to freedom of speech if he advertised his legal services in Florida. Because Gould's proposed advertisements concern unlawful activity or are misleading, the Florida Bar is entitled to regulate the proposed speech. We affirm.

We review a summary judgment *de novo* and draw all reasonable inferences in favor of the non-moving party. *Boim v. Fulton County Sch. Dist.*, 494 F.3d 978, 982 (11th Cir. 2007). Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

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* Honorable W. Harold Albritton, III, United States District Judge for the Middle District of Alabama, sitting by designation.

moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

This appeal requires us to address the regulation of two proposed advertisements for the provision of legal services within the State of Florida by an individual not licensed to practice law in the State of Florida. One advertisement relates to the provision of legal services for "NEW YORK LEGAL MATTERS ONLY"; the second advertisement relates to the provision of legal services in the area of "FEDERAL ADMINISTRATIVE LAW." Attorney advertising is commercial speech, which enjoys "a measure of First Amendment protection." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623, 115 S. Ct. 2371, 2375 (1995). Commercial speech that is misleading or concerns unlawful activity, however, is not protected by the First Amendment and may be freely regulated by the government. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm' of N.Y.*, 447 U.S. 557, 563-64, 115 S. Ct. 2343, 2350-51 (1980).

We first address Gould's challenge to the regulation of his proposed advertisement for the provision of legal services relating to New York legal matters from his Florida office. Gould complains that he has a credible fear of prosecution for publishing the following advertisement:

NEW YORK LEGAL MATTERS ONLY
M. RONALD GOULD LICENSED NEW YORK
ATTORNEY 1201 BRICKELL AVENUE, STE. 630
MIAMI, FLORIDA 33131
FREE PHONE CONSULTATION 305 865 2962

The Florida Bar responds that the proposed advertisement concerns unlawful activity.

We agree with the Florida Bar. Under Florida law, it is unlawful for "[a]ny person not licensed or otherwise authorized to practice law in [Florida]" to practice law within the State of Florida. Fla. Stat. § 454.23 (2004). Gould, who is not admitted to the Florida Bar, does not have the authority to practice New York law in Florida. *See* Fla. Stat., R. Regulating the Fla. Bar 4-5.5(b); *Florida Bar v. Rapoport,* 845 So. 2d 874, 877 (Fla. 2003); *Chandris, S.A. v. Yanakakis,* 668 So. 2d 180, 184 (Fla. 1995); *Florida Bar v. Savitt,* 363 So. 2d 559 (Fla. 1978). Because the proposed advertisement concerns unlawful activity, the Florida Bar is entitled to regulate the advertisement. *See Cent. Hudson,* 447 U.S. at 563-64, 100 S. Ct. at 2350.

We next address Gould's challenge to the regulation of his proposed advertisement for legal services "LIMITED TO FEDERAL ADMINISTRATIVE LAW." Gould complains that he has a credible fear of prosecution for publishing the following advertisement:

PRACTICE LIMITED TO
FEDERAL ADMINISTRATIVE LAW
CALL M. RONALD GOULD LICENSED NEW YORK
ATTORNEY 1201 BRICKELL AVENUE, STE. 630
MIAMI, FLORIDA 33131
FREE PHONE CONSULTATION 305 865 2962

The Florida Bar responds that this advertisement also concerns unlawful activity.

Gould argues that he is entitled to practice "federal administrative law" in Florida because a federal statute that amended the Administrative Procedure Act, 5 U.S.C. § 500(b), pre-empts any contrary regulation of the Florida Bar. Section 500(b) provides,

> An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

5 U.S.C. § 500(b). Gould contends that Florida cannot forbid him, as "a member in good standing of the bar of the highest court of a State," from representing a person before a federal agency. *See Sperry v. Florida,* 373 U.S. 379, 384-385, 83 S. Ct. 1332, 1325-26 (1963); *see also Augustine v. Dept. of Veterans Affairs,* 429 F.3d 1334, 1339-40 (Fed. Cir. 2005) (state without authority to require attorney practicing before a federal agency to first obtain a state bar license).

The Florida Bar responds that it is unlawful for Gould, who is not licensed to practice law in Florida, to engage in a general "federal administrative practice" in Florida and that, under *Central Hudson,* the Florida Bar is entitled to regulate an advertisement for those services because the advertisement concerns unlawful activity. The words "federal administrative law" apply to a broad range of legal issues, and are

not limited to the representation of persons before federal agencies. Issues of federal administrative law arise in state and federal courts, as well as before federal agencies.

We again agree with the Florida Bar. The proposed advertisement for a "practice limited to federal administrative law" is misleading and relates, at least in part, to unlawful conduct. Gould's proposed speech is not protected by the First Amendment and is subject to regulation by the Florida Bar.

The summary judgment in favor of the Florida Bar is

AFFIRMED.

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(1)

Supreme Court, U.S.
FILED
071139 FEB 27 2008
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

DIANA S. PARKER, Administrator
of the Estate of Ryan W. Parker, Deceased,

Petitioner,

v.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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February 27, 2008

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented

Petitioner's adult son was electrocuted in a Chicago train station accident. Four days short of six months later, as executor of his estate she filed and served a wrongful death lawsuit against the transit authority in charge of the station. It moved to dismiss because she had not, within six months, filed certain information under an Illinois "notice of claim" statute. That statute requires notice to be given by a "person who is about to commence a civil action" — *i.e.*, not by a person who (like petitioner) by the end of the six-month period has *already* commenced a civil action.

Petitioner thus argued that the plain language of the "notice of claim" statute could not bar her lawsuit. The trial court nonetheless dismissed it. On appeal petitioner argued that her wrongful death claim was federally protected "property" so that, given the plain-language approach to statutory interpretation long mandated by the Illinois Supreme Court, it violated due process to apply the "notice of claim" statute contrary to its plain language to deny her a hearing on the merits of her lawsuit. That argument was rejected. Two questions are thereby presented:

1. Whether a state court may deprive a state-law plaintiff of a hearing on the merits of her claim based on the application of a "notice of claim" statute which contradicts the plain language of the statute, even though the state supreme court has repeatedly pronounced a plain-language statutory interpretation rule.

2. More broadly, whether the due process principle prohibiting arbitrary interpretations of state law requires that state courts which profess to follow the plain language of statutes actually do so in cases in which a property right depends on adherence to plain language.

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Opinions Below

The order of the trial court dismissing the case (App. 23a) is unreported. The decision of the Appellate Court of Illinois, First Judicial District (as modified upon denial of rehearing) affirming the dismissal, from which review is sought (App. 1a), is unreported. The order of the Illinois Supreme Court denying discretionary review (App. 22a) is reported at 879 N.E.2d 932 (2007) (Table).

Jurisdiction

The intermediate appellate court decision (modified upon denial of rehearing) from which review is sought was entered on August 13, 2007. App. 1a. On September 17, 2007, the Illinois Supreme Court entered an order extending the time for filing a petition for discretionary review to and including October 5, 2007. A timely petition for discretionary review was denied on November 29, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) over this petition, which is being filed within the time permitted by 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1.

Statute Involved

The Illinois statute involved in this case, § 70 ILCS 3605/41 of the Illinois Compiled Statutes, is reprinted in its entirety in the appendix. App. 24a-25a.

Statement of the Case

Ryan W. Parker was the unmarried, young adult son of petitioner, Diana S. Parker ("Parker"). On August 1, 2004, Ryan attended a Chicago Cubs baseball game at Wrigley Field. Afterwards Ryan entered an elevated train station operated by

respondent Chicago Transit Authority ("CTA"), a municipally owned corporation. While waiting for a train, at some point Ryan either fell or was pushed from the platform, on to the rails. He came into contact with the electrified "third rail" and was electrocuted. App. 2a.

Six days short of six months later, on January 26, 2005, Parker filed a state-court wrongful death lawsuit against the CTA, acting solely in her capacity as executor of her son's estate. App. 4a. Two days later, Parker effected personal service of the complaint (on both the secretary of the CTA's board of directors and on the CTA's general counsel).

Although the relevant statute of limitations allowed Parker a full year to file suit, App. 24a, Parker's early filing supplied (or so it appeared) a means for avoiding any risk of procedural default under Section 41 of the Transit Act, 70 ILCS 3605/41 (reprinted at App. 24a-25a). Section 41 is a "notice of claim" statute of the sort which has long applied in litigation against local governmental entities, both in Illinois and nationwide. *See generally* Daniel E. Feld, Annotation, *Modern Status of the Law as to Validity of Statutes or Ordinances Requiring Notice of Tort Claim Against Local Governmental Entity*, 59 A.L.R.3d 93 (1974 & Supp. 2007). Section 41 states, regarding those civil actions to which it applies, that if a notice of certain specific facts about a claimed injury is not filed with the CTA in a specified manner, the civil action "shall be dismissed" and the plaintiff "shall be forever barred from further suing." App. 24a.

The Illinois courts have held plaintiffs to the exact wording of Section 41 in cases in which it imposes a notice obligation. They have dismissed cases for minor defects in the notice given, or in the manner conveyed, even where the CTA possessed actual knowledge of the

facts as to which formal notice was defective. *E.g.*, *Dimeo v. Chicago Transit Authority*, 724 N.E.2d 92, 95 (Ill. App. 1999) (time of incident not listed in notice, even though listed in medical records); *Yokley v. Chicago Transit Authority*, 717 N.E.2d 451, 453, 456 (Ill. App. 1999) (time of incident mistakenly reported as two hours too early); *Thomas v. Chicago Transit Authority*, 331 N.E.2d 216, 218 (Ill. App. 1975) (incorrect attending physician listed); *Watson v. Howard*, 749 N.E.2d 427, 429-30 (Ill. App. 2001) (only name of physicians' practice group, not name of individual attending physician, listed); *Barrera v. Chicago Transit Authority*, 812 N.E.2d 413, 415, 417 (Ill. App. 2004) (notice listed location of incident as a specific moving bus on a specific route shortly after plaintiff left a particular bus stop; notice held inadequate because plaintiff did not list *both* "bus stops she was between as the incident unfolded," even though defendant operates the route); *Sanders v. Chicago Transit Authority*, 581 N.E.2d 211, 213-14 (Ill. App. 1991) (notice received by only one of the two corporate offices entitled to receive it).

Despite the pitfalls it presents, the text of Section 41 also includes a safe harbor by which persons filing suit against the CTA can, through early action, eliminate the risk of procedural default posed by any small omission or error in notice. The second sentence of Section 41 states that only a "person who *is about to commence* any civil action against the Authority for damages on account of any injury to his person," App. 24a (emphasis added), must no later than six months after the claimed injury give the required notice. Textually, it follows that a person who at the end of six months *has already commenced* a civil action against the CTA has no notice obligations under Section 41 — such a person cannot be described as someone who is

"about to commence" a civil action. More than 30 years ago the Illinois Supreme Court, construing identical language in another "notice of claim" statute, held that a failure to give notice "did not warrant the dismissal of the plaintiff's complaint . . . filed within six months of the injury," and that in such a case "the furnishing of notice" was not "a condition precedent to the right to bring suit . . . ." *Saragusa v. City of Chicago*, 348 N.E.2d 176, 179-80 (Ill. 1976) (Schaefer, J.); *see also Dunbar v. Reiser*, 356 N.E.2d 89, 90-92 (Ill 1976).

The CTA moved to dismiss Parker's lawsuit pursuant to Section 41. Despite its text, the CTA argued that Section 41 imposed a blanket requirement on *all* plaintiffs, even those who filed early, to supply complete and accurate information on certain points (see note 2, *infra*) within six months of a claimed injury, and that Parker had not done so. In particular, it argued, Parker's complaint failed to state one item listed in Section 41, the "residence of the person injured" — that is, of Ryan W. Parker, who of course had no residence on the date the complaint was filed, having died nearly six months earlier. C29, C33.[1]

Parker opposed the motion to dismiss, arguing that based on the plain language of Section 41 as confirmed by the Illinois Supreme Court's decisions in *Saragusa* and *Dunbar*, Section 41 imposed no notice obligations

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[1] Citations to the record in the Illinois intermediate appellate court, which consists of a one-volume "common law record," are denoted "C__."

The CTA also argued that Parker had failed to meet Section 41's required notice of "the name of the attending physician, if any," and of "about the hour of the accident" (in addition to the date). C29. However, neither argument was adopted as a ground for the appellate court's ultimate ruling on appeal. App. 9a-10a & n.1.

pertinent to her case. C94-C101. The trial court disagreed, dismissing her lawsuit in a one-page order, without opinion. App. 23a.

On appeal, in addition to her state-law arguments, Parker specifically argued that she had a constitutionally protected "property" interest in her state-law wrongful death claim, and that the trial court's order was such a bizarre departure from the plain language of Section 41, and the dismissal of her claim without a hearing on the merits was so arbitrary, as to violate federal due process. Brief of Plaintiff-Appellant filed June 30, 2006, at 7-12, 26-33. Particularly arbitrary, she argued, was the CTA's theory that her Section 41 notice (assuming any notice requirement attached to her at all) had failed because Ryan's residence was not listed in the complaint. "After his death, Ryan had no residence," she pointed out — so that the CTA was insisting the complaint must be dismissed because it failed to give notice of "non-existent information . . . ." *Id.* at 27-28.

The Illinois intermediate appellate court nonetheless affirmed the dismissal of the case pursuant to Section 41. App. 1a-21a. In so doing, it specifically addressed and rejected Parker's federal constitutional objections. App. 2a, 20a-21a.

In ruling against Parker on a subsidiary aspect of the case (not relevant here), the court emphasized the need to focus on the plain language of a statute, and the rule that "[i]f the statutory language is clear, we need not look further to construe the statute." App. 17a. Yet on the main issue in the case — the threshold issue of whether Section 41 applied to Parker *at all* — the court fell silent on the plain-language rule. Even while quoting the language of Section 41 stating that its notice requirements apply only to persons who are "about to commence" a lawsuit, App. 5a, the court

offered no explanation as to how, consistent with federal due process, the text could be read as extinguishing the claim of Parker, who had *already* commenced a lawsuit.

The court was equally opaque as to its reasons for believing that the defects it perceived in the notice given by Parker (assuming any notice at all was required) could, consistent with federal due process, supply a non-arbitrary basis for dismissing Parker's lawsuit under Section 41. Of the five notice items set out in Section 41,[2] the court found that the only item as to which the complaint failed to give notice pertained to item 2, about the "residence of the person injured . . . ." App. 10a ("complaint did not include . . . the decedent's address"). This was information which, as Parker had pointed out, did not exist on the date the complaint was filed (as Ryan was dead).

The only other notice defect found by the court was that "[t]he complaint did not include the plaintiff's address . . . ." App. 10a. In so doing the court ignored the text of the statute indicating that where, as here, the plaintiff is not the person injured (Parker is suing solely on behalf of Ryan's estate, and is not claiming her own injury), Section 41 does not require notice of

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[2] In the cases in which it applies, Section 41 requires notice by a specified date and in a specified form of:

> (1) "the name of the person to whom the cause of action has accrued";
>
> (2) "the name and residence of the person injured";
>
> (3) "the date and about the hour of the accident";
>
> (4) "the place or location where the accident occurred"; and
>
> (5) the name and address of the attending physician, if any."

App. 24a.

the plaintiff's address.

Thus, the dismissal of Parker's wrongful death claim was affirmed based on Parker's purported failure to give notice of information: (1) which did not exist, or (2) as to which Section 41 requires no disclosure.

Parker then sought discretionary review in the Illinois Supreme Court, where she argued that the lower court's dismissal of her lawsuit hinged on an application of Section 41 so contrary to the "clear language of the statute" as to produce "absurd" and "unconstitutional results." Petition for Leave to Appeal, filed Oct. 5, 2007, at 2, 12; *see also id.* at 15, 17. Discretionary review was denied on November 29, 2007. App. 22a. This petition follows.

Reasons for Granting the Writ

I. The Illinois Appellate Court's Decision Conflicts With This Court's Decisions Protecting State-Law Claims as "Property," and Holding That Arbitrary Applications of State Law Which Extinguish State-Law Claims Violate Due Process

The Illinois appellate court's decision affirming the dismissal of Parker's lawsuit based on the notice provisions of a statute (Section 41 of the Transit Act) which by its express terms does not apply to Parker, coupled with her failure to disclose information which either did not exist or was explicitly not required under the statute, conflicts with this Court's due process precedents stretching back decades. On occasion, petitioners before this Court obtain redress on a showing that state courts have applied state procedural rules to block litigation of the merits in a way "so bizarre as to inject an Alice-in-Wonderland quality into

the proceedings." *Spencer v. Kemna*, 534 U.S. 362, 383 (2002) (quoting lower court dissent). This is such a case. Here, as in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1930), the relevant state law does not permit the conclusion that Parker failed "to comply with any existing condition precedent" to suit. To adopt such a bizarre construction would deny a plaintiff "due process in the primary sense," that is, an "opportunity to present its case and be heard in its support." *Id.* at 681.

Even ardent supporters federalism have recognized the need for this Court to police the outer boundaries of state courts' discretion to "interpret" state procedural rules in ways which arbitrarily deny litigants a hearing on the merits. As Justice Brandeis pointed out in *Brinkerhoff-Faris*, assuming it would be an "obvious" violation of due process for a legislature to impose a particular arbitrary procedural rule blocking a plaintiff from reaching the merits:

> The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.

Id. at 679-80 (citation and footnote omitted). *See also Bush v. Gore*, 531 U.S. 98, 114-15 (2000) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., concurring) (summarizing several areas "in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law" to determine if there has been an impermissible departure from "a fair reading" of that state law); *Richards v. Jefferson*

County, 517 U.S. 793, 804 (1996) (applying "traditional rule that an extreme application of state-law res judicata principles violates the Federal Constitution."). *See generally* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1922-27, 1940-43, 1957-67, 1984-86 (2003).

It is well established, under this Court's decisions stretching back more than a century, that Parker's already accrued cause of action for the wrongful death of her son is "property" within the meaning of the Due Process Clause of the Fourteenth Amendment. *E.g.*, *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-30 (1982) *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 345-46 (1928); *Angle v. Chicago St. M. & O. Ry.*, 151 U.S. 1, 19 (1894); *Pritchard v. Norton*, 106 U.S. 124, 132 (1882); *Munn v. Illinois*, 94 U.S. 113, 134 (1877).

It follows from Parker's property interest, of course, that due process does not permit the Illinois courts to apply Illinois law in a manner which arbitrarily deprives Parker of a hearing on the merits of her cause of action. Indeed, this principle was cemented a quarter century ago in another case brought to this Court from an Illinois state court involving a state-law cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In *Logan*, an Illinois agency sought to terminate an employment discrimination complaint "because a state official, for reasons beyond the complainant's control, failed to comply with a statutorily mandated procedure." *Id.* at 424. In reversing the Illinois Supreme Court's denial of the employee's due process objection, this Court

reiterated that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," *id.* at 428, and explained why due process does not permit a State to apply its law in a manner which arbitrarily extinguishes an accrued cause of action without providing an opportunity to litigate the cause of action. *Id.* at 433-37.

The due process violation in this case is more stark than in *Logan*. There, the noncompliance with a state-mandated procedure which the Illinois courts regarded as fatal apparently involved mere "inadvertence" by a low-level official, *id.* at 426, and the Illinois Supreme Court's rejection of the employee's due process objection was based principally on its "bitter with the sweet" theory that the employee had no property right in his statutorily created claim. *Id.* at 427-28. Here, by contrast, the state officials who are failing to comply with mandated procedures are not low-level bureaucrats. They are state appellate judges. And their actions are hardly inadvertent: while declaring their allegiance to the plain-language rule of statutory interpretation in one section of their opinion ruling against Parker, App. 17a-19a, they flouted that same rule in the section of their opinion applying to Parker a notice statute which by its terms cannot apply to her, and procedurally defaulting her because she did not give notice of information as to which the statute requires no notice. See pp. 5-7, *supra*.

Especially in comparison to the procedural timing rule involved in *Logan*, the plain-language rule whose violation by state appellate judges has caused Parker's claim to be extinguished must be regarded as fundamental for due process purposes. The Illinois Supreme Court has instructed the lower courts to follow a plain-language approach to the interpretation of state statutes, in accord with the traditional "rule that when

the text of a statute is clear, that is the end of the matter." Hon. Antonin Scalia, *A Matter of Interpretation* 16 (1997). *E.g.*, *People v. Lewis*, 860 N.E.2d 299, 305 (2006) ("When statutory language is plain and unambiguous, we must apply the statute as written without resort to aids of statutory construction."); *In re Michelle J.*, 808 N.E.2d 987, 992 (Ill. 2004) ("We cannot rewrite a statute under the guise of statutory construction or depart from the plain language of a statute by reading into it exceptions, limitations, or conditions not expressed by the legislature."); *Land v. Board of Educ. of City of Chicago*, 781 N.E.2d 249, 257 (Ill. 2002) ("In the absence of ambiguity, we must rely on the plain and ordinary meaning of the words chosen by the legislature."); *Ultsch v. Illinois Municipal Retirement Fund*, 874 N.E.2d 1, 10 (Ill 2007) ("There is no rule of statutory construction that authorizes a court to declare that the legislature did not mean what the plain language of the statute says.").

The decision below depriving Parker of a hearing on the merits rests on a wholly arbitrary application of Section 41 which cannot be squared with this plain-language rule. The express language of Section 41 exempted Parker from its notice requirement (and the attendant risk of procedural default in the event of even minor errors or omissions) because her counsel took care to file and serve her complaint four days before the six months were up. Thus, six months after Ryan's death, when notice would otherwise be due, Parker did not fall within the class of persons targeted by the statute — she was not a "person who is about to commence" a lawsuit. App. 24a. By then, she had already commenced her lawsuit.

Judged by the explicit language of the statute imposing a deadline, Parker's *success* in avoiding any risk of losing her property interest under Section 41 (by

filing and serving her complaint four days before the deadline) is just as clear as the *failure* of the property owners in *United States v. Locke*, 471 U.S. 84 (1985), to meet a confusingly worded statutory deadline under which they lost their statutorily protected mining claims based on this Court's "literal reading" of the statute at issue (under which their filing was a day late). *Id.* at 89-91, 93-94. Even though a literal reading of Section 41 protected Parker from forfeiture of her cause of action, the Illinois appellate court arbitrarily subjected Parker to the statute's strictures. Equally arbitrary was the court's basis for finding Parker in violation of the notice provision: that Parker had neglected to give notice of non-existent information (the residence of a dead person), and that Parker had neglected to give notice of information which Section 41 does not require be disclosed (the address of a non-injured plaintiff suing in a representative capacity).

Nor can anything be found in authoritative precedent which casts doubt on this reading of Section 41's plain language. Indeed, in a case interpreting another "notice of claim" statute with language identical in relevant respect to Section 41, more than 30 years ago the Illinois Supreme Court held — consistent with the explicit language — that notice obligations do not apply to a plaintiff who has filed a complaint before the six-month notice period runs. *Saragusa v. City of Chicago*, 348 N.E.2d 176, 179-80 (Ill. 1976) (Schaefer, J.) (holding that where a plaintiff's complaint is "filed within six months of the injury for which recovery was sought," a "furnishing of notice" is not "a condition precedent to the right to bring suit"); *see also Dunbar v. Reiser*, 356 N.E.2d 89, 90-92 (Ill.

1976).[3]

The due process issue at stake here goes beyond the particulars of Parker's property interest, and the particulars of the arbitrary infringement on that interest by the courts of Illinois. At stake is a basic premise of the rule of law. State courts obviously have considerable discretion in the interpretive principles they choose to apply to the enactments of their own legislatures. They need not adopt an emphasis on the plain language of statutes. They are free, if they wish, to adopt an "all things considered" approach to statutory interpretation under which not just the text, but legislative history and perhaps other sources of information are consulted before any conclusion is reached as to the meaning of a statute. Perhaps they are even free, if they wish, to engage in a methodology

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[3] As of the date the complaint in this case was filed, January 26, 2005, no lower Illinois appellate court had issued any holding on whether under Section 41 (as with the statute considered in *Saragusa*), the mere filing of a complaint within six months of an injury eliminates any notice obligation. However, several cases, decided as early as 1989, had "so indicated in *dicta*." *Cione v. Chicago Transit Authority*, 748 N.E.2d 722, 728 n.* (Ill. App. 2001) (citing cases). Such cases addressed whether "incomplete notice given during the statutory time period could be cured by the filing of a complaint on the last day before expiration of that time period." *Joseph v. Chicago Transit Authority*, 715 N.E.2d 733, 737 (Ill. App. 1999). Where, instead, a plaintiff filing a complaint early has given incorrect notice which affirmatively misleads the CTA (as opposed to incomplete notice), at least one Illinois intermediate court panel has taken the view that such a filing constitutes a violation of Section 41 warranting dismissal of the case — in the process setting forth its own *dicta* on the meaning of Section 41, in tension with the *dicta* set out by earlier panels. *Curtis v. Chicago Transit Authority*, 793 N.E.2d 83, 86-89 (Ill. App. 2003). To date the Illinois Supreme Court has declined to review any case (including this one) to sort out the conflicting lower court *dicta*.

for statutory interpretation so subjective that it involves an inquiry into "unexpressed legislative intent," despite the attendant risk "that, under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires," not those of legislators. Scalia, *supra*, at 17-18.

What state courts may not do consistent with due process, we submit, is to disclaim such judicial subjectivity, announce to those affected by their decisions that they will follow a plain-language rule, but then refuse to follow it. "Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible." *Id.* at 24. Rules, including the plain-language rule, cannot count as "rules" at all unless they are actually applied in practice — unless, in a situation in which a rule clearly controls, citizens can count on judges to follow the rule even if they would prefer a different result.

The consistent application of announced rules is fundamental to the rule of law. *E.g.*, Joseph Raz, *The Authority of Law: Essays on Law and Morality* 217 (1979) ("[I]t is futile to guide one's action on the basis of law if when the matter comes to adjudication the courts will not apply the law and will act for some other reasons."); Martha I. Morgan, *Playing by the Rules: Due Process and Errors of State Procedural Law*, 63 Wash. U. L.Q. 1, 12-29 (1985); Edward L. Rubin, *Administrative Due Process and the Administrative State*, 72 Cal. L. Rev. 1044, 1102-09 (1984); Thomas A. Smith, Note, *The Rule of Law and the States: New Interpretation of the Guarantee Clause*, 83 Yale L.J. 561, 565-73 (1984). Without binding rules, "people will only be able to be guided by their guesses as to what the courts are likely to do — but these guesses will not be based on the law but on other considerations." Raz,

supra, at 217. "Only by announcing rules do we hedge ourselves in. . . . The chances that frail men and women will stand up to their unpleasant duty" to apply the law, even if counter to popular will, "are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases." Hon. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1180 (1989).

Where, as here, there is a crystal-clear departure from the plain language of a statute in a jurisdiction in which courts profess to apply the plain language of statutes, and where the result is the procedural default of the substantial property right of a plaintiff who relied on that plain language, review by this Court is warranted as a means of enforcing its core precedents and reminding lower courts of the need for scrupulous adherence to basic principles of due process, and to the rule of law generally.

II. Summary Reversal of the Decision Below Would be an Efficient Means By Which to Reinforce, for the Benefit of the Lower Courts, Minimum Due Process Standards

Although the issues discussed above are suitable candidates for plenary consideration by this Court and we of course stand ready to brief them on the merits, we respectfully submit that the due process error in the decision of the court below is so obvious that this Court can dispose of the case, pursuant to Sup. Ct. R. 16.1, through a per curiam opinion summarily reversing the decision. This Court has, of course, issued summary reversals with increasing frequency in recent years, including a 2004 summary reversal of a federal due process decision by the same Illinois appellate court

which decided Parker's case.[4] Summary reversal of the decision below would be an efficient means by which this Court can reinforce, for the benefit of the Illinois courts and other lower courts, minimum due process standards.

Conclusion

The Illinois appellate court's opinion dismissing Parker's case is wholly arbitrary and blatantly conflicts with this Court's precedents. The example it sets undermines the rule of law. This Court should grant the petition for a writ of certiorari and summarily reverse. Alternatively, the Court should grant the petition and set the case for briefing and argument.

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[4] Eugene Gressman, *et al.*, *Supreme Court Practice* § 4.17, at 278-79 (9th ed. 2007). *E.g.*, *Gonzalez v. Thomas*, 547 U.S. 183, 186-87 (2006) (per curiam) (summarily reversing lower court's handling of procedural issue as an obvious error inconsistent with an earlier decision of this Court); *Schriro v. Smith*, 546 U.S. 6 (2005) (per curiam) (same); *Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (per curiam) (summarily reversing lower court's grant of federal habeas relief based on the particular circumstances of the case); *Bradshaw v. Richey*, 546 U.S. 74 (2005) (per curiam) (same); *Bell v. Cone*, 543 U.S. 447, 452-60 (2005) (per curiam) (same); *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam) (same); *Middleton v. McNeil*, 541 U.S. 433 (2004) (per curiam) (same); *Dye v. Hoffbauer*, 546 U.S. 1 (2005) (per curiam) (summarily reversing lower court's rejection of federal habeas relief based on the particular circumstances of the case); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (per curiam) (summarily reversing lower court's grant of judgment as a matter of law based on the particular circumstances of an employment discrimination case); *Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam) (summarily reversing Illinois appellate court decision in favor of a criminal defendant which was based on an overly broad reading of one of this Court's federal due process decisions).

Respectfully submitted.

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February 27, 2008

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APPENDIX A

FIRST DIVISION
Filed:08/13/07

No. 1-05-3555

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIANA S. PARKER, Administrator of the Estate of Ryan W. Parker, Deceased,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
v.	)	No. 05 L 0973
CHICAGO TRANSIT AUTHORITY, a municipal corporation,	)	Honorable Lynn Egan,
Defendant-Appellee.	)	Judge Presiding.

MODIFIED ORDER UPON
DENIAL OF REHEARING

Plaintiff Diana S. Parker, administrator of the estate of Ryan W. Parker (decedent), brought a wrongful death action in the circuit court of Cook County against defendant, Chicago Transit Authority (CTA), to recover damages for the death of her son, who was electrocuted when he came into contact with the electrified third rail at the CTA Addison Street train station. The CTA successfully moved to dismiss the complaint pursuant to section 2-619(a)(9) of the

Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2004)), on the grounds that plaintiff failed to give the CTA proper notice of the claim within six months of the incident, as required by section 41 of the Metropolitan Transit Authority Act (Transit Act) (70 ILCS 3605/41 (West 2004)). On appeal, plaintiff contends that (1) she satisfied the notice requirements of section 41 by sending her notice of intent to file a civil action against CTA to their legal department, (2) even if her notice was insufficient, the deficiencies in her notice were cured when she filed and served the CTA with her complaint within the time for filing the section 41 notice, (3) the CTA should be estopped from asserting plaintiff's failure to comply with the notice requirement because the CTA's claim adjuster's prelitigation conduct lulled plaintiff into a false sense of security and the CTA did not comply with the requirement of section 41 that it send a claimant a copy of section 41 within a specified time after receiving the claim, (4) section 41 does not apply to wrongful death actions, and (5) application of section 41 to a wrongful death claim is unconstitutional.

BACKGROUND

On August 1, 2004, plaintiff's decedent was a spectator at a Chicago Cubs baseball game at Wrigley Field. After the game, plaintiff's decedent entered the CTA's Addison Street train station and waited on the elevated platform for the arrival of a CTA train. At some point before a train arrived, decedent either fell, or was pushed from the platform to the elevated rail bed. Plaintiff's decedent ultimately came into contact with the third rail and was electrocuted.

The first correspondence made between plaintiff's counsel and the CTA occurred on September 1, 2004. The correspondence consisted of a notice of attorney's lien, which was addressed to the CTA's legal department.

After receiving the attorney's lien letter on September 3, 2004, a CTA claims representative sent plaintiff's counsel a copy of section 41, as required by paragraph 2 of section 41 of the Transit Act. 70 ILCS 3605/41 (West 2004).

Approximately three weeks later, plaintiff's counsel sent a letter to the CTA claims representative that stated that it was "formal notice" pursuant to section 41. The notice contained the following information: (1) it identified plaintiff as the claimant; (2) it listed plaintiff's address; (3) it gave the decedent's name and listed the decedent's address as "West Addison Chicago, Illinois"; (4) it listed the time and date of the accident; and (5) it described the location of the accident as "the Addison Street train stop." The notice did not provide the name of an attending physician but stated that a "team of specialists" treated the decedent at Illinois Masonic Hospital and did not give the addresses of those physicians. In addition to the notice, plaintiff's counsel enclosed various newspaper articles documenting the accident. The letter closed with the following statement: "if you need anything additional in regards to this civil action, please feel free to contact me at any time. I will assume unless I hear something, that this notice is in full compliance with the aforementioned statute."

On October 7, 2004, in response to correspondence initiated by the CTA, plaintiff's counsel sent a letter to the same claims representative changing the decedent's address to that of the plaintiff and

repeating the same information as in the earlier notice. The letter reiterated. the language employed in the first letter to the CTA which consisted of "if you need anything additional in regards to this civil action, please feel free to contact me at any time. I will assume unless I hear something, that this notice is in full compliance with the aforementioned statute." No communication between the CTA and the plaintiff occurred thereafter, until the filing of the instant suit.

On January 26, 2005, plaintiff sued the CTA for the wrongful death of her son. Plaintiff served both the secretary of the Board and the General Counsel of the CTA with her complaint within six months of the accident. On February 25, 2005, the CTA filed a motion to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2004)). The CTA alleged that plaintiff failed to comply with the notice requirements under section 41 of the Transit Act. 70 ILCS 3605/41 (West 2004). In response, plaintiff argued that she satisfied the notice requirements of section 41 because she filed her complaint and served both the secretary of the Board and the General Counsel of the CTA within six months of the accident. On July 1, 2005, the trial court granted the CTA's motion and dismissed plaintiff's complaint with prejudice. This timely appeal followed.

ANALYSIS

Section 41 of the Transit Act in pertinent part provides:

"No civil action shall be commenced in any court against the [Chicago Transit Authority] by any person for any injury to his person unless it is commenced within one year from the date that the injury was received or the cause of action accrued. Within six (6) months from the date that such an injury was received or such cause of action accrued, any person who is about to commence any civil action in any court against the Authority for damages. on account of any injury to his person shall file in the office of the secretary of the Board and also in the office of the General Counsel for the Authority either by himself, his agent, or attorney, a statement, in writing, signed by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred and the name and address of the attending physician, if any. If the notice provided for by this section is not filed as provided, any such civil action commenced against the Authority shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing." 70 ILCS 3605/41 (West 2004).

Plaintiff argues that she satisfied the notice requirements of section 41 by sending her notice of intent to file a civil action against the CTA to their legal department. Specifically, plaintiff argues that the letters fulfilled the requirements of section 41 because

the letters contained all the information required by section 41 to effectuate proper notice of an intent to sue. She also argues that listing an attending physician in the notice in this case was unnecessary because the decedent died almost immediately after being electrocuted and was not rendered medical assistance by a physician prior to his death. Plaintiff then cites *Saragusa v. City of Chicago*, 63 Ill. 2d 288, for the proposition that even if the notice contained in the letters to the CTA's legal department was insufficient, the deficiencies in the notice were cured when she filed her complaint and served the CTA within the time for filing the section 41 notice.

A. Standard of Review

Under section 2-619(a)(9) of the Code, a complaint may be dismissed where "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2004). Affirmative matter is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). When ruling on a motion to dismiss, all pleadings and supporting documents must be interpreted in the light most favorable to the nonmoving party. *Johnson v. Chicago Transit Authority*, 366 Ill. App. 3d 867, 869 (2006). A court should grant a motion to dismiss where the plaintiff can prove no set of facts that would support his cause of action. Johnson, 366 Ill. App. 3d at 869. Our standard of review is *de novo* because the sufficiency of the notice is a legal question. *Johnson*, 366 Ill. App.

3d at 869-70.

B. Strict Compliance

Illinois cases have consistently held that section 41 notice requirements demand strict compliance and that the burden of such compliance falls solely on the plaintiff. *Johnson*, 366 Ill. App. 3d at 870, citing *Curtis v. Chicago Transit Authority*, 341 Ill.. App. 3d 573, 576 (2003); *Cione v. Chicago Transit Authority*, 322 Ill. App. 3d 95, 97 (2001); *Joseph v. Chicago Transit Authority*, 306 Ill. App. 3d 927, 930 (1999); *Murphy v. Chicago Transit Authority*, 191 Ill. App. 3d 918, 922 (1989) ("section 41 puts the burden upon the claimant to ascertain her rights and to comply with the statutory prerequisites for maintaining a lawsuit against the CTA").

Of operative concern to this appeal is the requirement that the plaintiff file with both the secretary of the Board and the General Counsel of the CTA the following information within six months of an accident: (1) the name of the person to whom the cause of action has accrued; (2) the name and residence of the person injured; (3) the date and approximate hour of the accident; (4) the place or location where the accident occurred; and (5) the name and address of the attending physician, if any. *Curtis*, 341 Ill. App. 3d at 576. "The requirement under the Transit Act to file notice within six months of an accident in the office of the secretary of the Board and also in the office of the General Attorney for the Authority is mandatory and the plaintiff has the burden of strictly complying with that requirement." *Joseph*, 306 Ill. App. 3d at 930. "The law is well settled that this requirement is mandatory, a condition precedent to bringing an action

against a transit authority. It cannot be waived or lightly excused." *Streeter v. Chicago Transit Authority*, 272 Ill. App. 3d 921, 923 (1995).

We first examine whether plaintiff's notice to the General Counsel of the CTA was sufficient, and find that it was.

Plaintiff's second letter serving as "formal notice" provided the following information: (1) it identified plaintiff as the claimant; (2) it listed plaintiff's address; (3) it gave decedent's name and address (the second letter stated that decedent's address was that of the plaintiff); (4) it listed the time and date of the accident; and (5) and it identified the location of the accident.

The CTA argues that this notice was insufficient because it failed to list the name and address of an attending physician as required by section 41. Specifically, the CTA argues that because the plaintiff stated that a "team of specialists" had treated plaintiff at Illinois Masonic Hospital, plaintiff therefore must have listed the name and address of every doctor in order to effectuate proper notice.

Plaintiff argues that listing the name and address of an attending physician was unnecessary in this case because the plaintiff died almost immediately fter being electrocuted. We agree.

In the context of section 41 notices "the term 'attending physician' has been specifically defined as the 'physician who treats plaintiff for injuries which were allegedly the result of the incident in question.' "*Watson v Howard*, 322 Ill. App. 3d 562, 566 (2001), quoting *Margolis v. Chicago Transit Authority*, 69 Ill. App. 3d 1028, 1033 (1979). Viewing the pleadings and supporting documents in the light most favorable to the plaintiff in this case it is apparent that plaintiff is

claiming that the decedent died instantly or soon after coming into contact with the third rail of the CTA platform bed. If the decedent had died prior to being seen by a physician, it was impossible for a physician to have rendered "treatment" to the decedent even under the expansive definition of that term. *Margolis v. Chicago Transit Authority*, 69 Ill. App. 3d 1028 (1979) ("'Treatment has been defined as a broad term covering all the steps taken to effect a cure of injury or disease, including examination and diagnosis, as well as the application of remedies' [Citations omitted]"). We therefore find that plaintiff's notice to the General Attorney of the CTA was sufficient.

Our analysis however does not end here. As noted, a claimant is required to effectuate notice "within six months of an accident in the office of the secretary of the Board" as well as the office of the General Attorney. *Joseph*, 306 Ill. App. 3d at 930. It is undisputed that plaintiff never sent a letter to the office of the secretary. However, plaintiff argues that the filing and service of her complaint, within the statutory period for notice satisfied the notice requirements of section 41. Plaintiff's complaint provided the secretary and General Counsel of the CTA with "the name of the person to whom the cause of action has accrued, the name *** of the person injured, the date and about the hour of the accident, [and] the place or location where the accident occurred." 70 ILCS 3605/41 (West 2004). However, the complaint did not provide plaintiff's address or decedent's address.[1]

As noted, a plaintiff must strictly comply with the

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[1] As we have already noted, the name and address of an "attending physician" was not necessary in this case.

Act and must "completely and correctly" include all elements required. *Hemphill v. Chicago Transit Authority*, 357 Ill. App. 3d 705, 712 (2005). Under the strict compliance standard, a section 41 notice is "'insufficient if one or more of the essential elements is omitted.'" *Hemphill*, 357 Ill. App. 3d at 712, quoting *Davis v. Chicago Transit Authority*, 326 Ill. App. 3d 1023, 1028 (2001). Since the burden of strict compliance rests solely on plaintiff CTA's actual knowledge of the alleged accident or its location cannot be considered in determining whether plaintiff strictly complied with section 41. *Hemphill*, 357 Ill. App. 3d at 712.

Here, plaintiff's complaint was insufficient to operate as proper notice to the secretary of the Board. The complaint did not include the plaintiff's address or the decedent's address.

Despite the foregoing, plaintiff contends that, pursuant to Saragusa, the mere filing of the complaint within the statutory period sufficiently cures a notice deficiency even if the complaint did not supply all of the information required by the notice statute. We disagree.

Saragusa was decided under now repealed section 8-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (Ill. Rev. State. 1971, ch. 85, par. 8-102). *Joseph*, 306 Ill. App. 3d at 931. Like section 41 of the Transit Act, section 8-102 of the Tort Immunity Act required 'that a person about to bring a suit against a local public entity give written notice within six months of the date the injury was received or the cause of action accrued. *Johnson*, 366 Ill. App. 3d at 871. The supreme court held that the filing of a complaint within the statutory notice period cured the defect in the plaintiff's written

notice, which was the failure to give the name and address of the treating physician. *Saragusa*, 63 Ill. 2d at 294. The supreme court explained that the legislative purpose of the notice requirement was to encourage early investigation and that purpose could be furthered with the filing of the complaint because such information would be revealed during discovery. *Saragusa*, 63 Ill. 2d at 294 ("the filing of a complaint within the six-month period affords as much time to investigate the claim as the defendant would have if the notice had been filed within that period").

However, although the Tort Immunity Act and the Transit Act are similar, the analysis of whether the filing and serving of a complaint within the notice period cures any deficiency in the notice is not the same. While the Transit Act's notice requirements are to be strictly construed, Illinois courts have liberally construed the provisions of the Tort Immunity Act. As this court noted in Curtis:

> "The liberal construction of the 1971 Tort Immunity Act * * * was consistent with the legislature's extension of the time within which notice must be filed under the Tort Immunity Act in 1973 [citation], and the subsequent total elimination of those notice requirements in 1986 [citations]. These liberalized revisions, however, were not correspondingly extended by the legislature to the six-month notice requirement of the Transit Act. Consequently, the Transit Act remained unchanged, explicitly providing that a cause of action must be dismissed for failure to comply with section 41 requirements. [Citation]. Moreover, the more stringent requirements of the Transit Act have

> withstood constitutional. equal protection challenges as a result of the magnitude of the CTA's operations. [Citations]." *Curtis*, 341 Ill. App. 3d at 578-79.

Accordingly, *Curtis* held that the mere filing of a complaint could not cure a plaintiff's deficient notice. *Curtis*, 341 Ill. App. 3d at 579. In *Curtis*, we explained that "even if a defective section 41 notice may be cured by the filing of a complaint with the statutory. period, the complaint must at least provide the statutorily required information in order to comply with the strict demands of section 41. *Curtis*, 341 Ill. App. 3d at 579-80. Further, we observed that the CTA's actual notice of the omitted or incorrect information was of no import. *Curtis*, 341,Ill. App. 3d at 580 ("The fact that the CTA had or could have obtained the correct information despite the deficiency in plaintiff's notice is irrelevant to the issue of whether notice was properly provided, as the CTA has no affirmative duty to obtain information that is missing from or reported incorrectly in a plaintiff's section 41 notice").

Illinois cases have consistently held that the section 41 notice provision requires strict compliance. Therefore, even if we agree that the filing and serving of a complaint within the six-month notice period could satisfy the notice requirements, in this case, plaintiff's complaint was insufficient. "For a complaint to satisfy the section 41 notice requirements, it must provide all of the statutorily required information." *Johnson*, 366 Ill. App. 3d at 874, citing *Curtis*, 341 Ill. App. 3d at 579-801. Plaintiff's complaint did not provide that information. She omitted her address and the address of the decedent from the complaint. Accordingly, the trial court did not err by dismissing plaintiff's

complaint because plaintiff failed to provide the statutorily required information to the secretary of the Board of the CTA within the applicable notice period.

Plaintiff then contends that the CTA was estopped from objecting to any deficiencies in her section 41 notice because she detrimentally relied upon the representations by the CTA's claim adjuster. As noted, plaintiffs counsel sent two letters to the CTA's claim adjuster. The first letter provided all the pertinent information required by section 41, save the deceased's address which was listed as "West Addison Chicago, Illinois." Upon the request of the claim adjuster; plaintiff's counsel sent a second letter to the CTA that changed the deceased's address App. 22 to that of his mother. Both letters were concluded with the following language: "if you need anything else in regards to this civil action, please feel free to contact me at any time. I will assume unless I hear something, that this notice is in full compliance with the aforementioned statute." Plaintiff argues that the CTA should be estopped from asserting section 41 as a defense to this action because the actions of the claim adjuster led plaintiff to believe that her notice was sufficient and lulled plaintiff into a false sense of security.

"Courts generally do not favor the application of the doctrine of equitable estoppel to municipal corporations." *Curtis*, 341 Ill. App. 3d at 581. "However, this court has held that the CTA may be estopped from asserting a failure to comply with section 41 where a plaintiff demonstrates that 'she was led to detrimentally rely upon the conduct or statements of the CTA and that such reliance was in good faith.' " *Curtis*, 341 Ill. App. 3d at 581, citing *Dimeo v. Chicago Transit Authority*, 311 Ill. App. 3d 152, 154 (1999).

For instance, in *Pothier v. Chicago Transit Authority*, 238 Ill. App. 3d 702 (1992) and *Searcy v Chicago Transit Authority*, 146 Ill. App. 3d 779 (1986), this court found that the plaintiffs had alleged sufficient facts to raise the issue of equitable estoppel where the plaintiffs asserted that CTA claim representatives had actively misled them into believing the CTA admitted liability and would settle their claims. However, we have refused to invoke the doctrine of estoppel to excuse the noncompliance with section 41 where a plaintiff's counsel was assured by a claim adjuster that settlement was proceeding or where the: plaintiff's counsel followed a claim representative's instructions and those instructions did not include the submission of a formal notice. *Barrera v Chicago Transit Authority*, 349 Ill. App. 3d 539, 545 (2004); *Curtis*, 341 Ill: App. 3d at 581-82 (and cases cited therein); *Murphy*, 191 Ill. App. 3d at 923.

Here, the CTA claim adjuster sent a letter with instructions to plaintiff's counsel, who was clearly aware of the section 41 requirements, but failed to comply with those requirements when responding to the letter. The CTA's letter did not represent that plaintiff's counsel need not take whatever steps were required by law to safeguard his client's claim. There is no evidence in this case that plaintiff relied to her detriment on any statements or actions of the CTA. The CTA did not admit liability, or assure plaintiff that her lawsuit would be settled out of court as it did in *Pothier* and *Searcy*.

Furthermore, the CTA is not estopped from asserting section 41 as a defense to plaintiff's action because of the claim adjuster's failure to notify plaintiff's counsel that the notice was insufficient. The CTA did not have an affirmative duty to notify plaintiff

that her notice was defective, and the CTA's failure to do so is not the kind of conduct implicated under the doctrine of equitable estoppel. See *Curtis*, 341 Ill. App. 3d at 582; *Barrera*, 349 Ill. App. 3d at 545.

Plaintiff then contends that the CTA should be estopped from asserting section 41 as a defense to this action because the CTA did not comply with the requirement of section 41 that it send a claimant a copy of section 41 within a specified time after receiving the claim. Section 41 provides in relevant part:

> "Any person who notifies [defendant] that he or she was injured or has a cause of action shall be furnished a copy of Section 41 of this Act. Within 10 days after being notified in writing, [defendant] shall either send a copy by certified mail to the person at his or her last known address or hand deliver a copy to the person who shall acknowledge receipt by his or her signature. *** In the event [defendant] fails to furnish a copy of Section 41 as provided in this Section, any action commenced against [defendant] shall not be dismissed for failure to file a written notice as provided in this Section." 70 ILCS 3605/41 (West 2004).

A person who notifies the CTA in writing that she was injured must be provided a copy of section 41. *High v. Chicago Transit Authority*, 345 Ill. App. 3d 964, 968 (2004). " `Any communication that can be reasonably interpreted as notification that an individual claimant was injured' " qualifies. *Puszkarska v. Chicago Transit Authority*, 322 Ill. App. 3d 75, 79, quoting *Fields v. Chicago Transit Authority*, 319 Ill. App. 3d 683, 688-89

(2001). This court has previously rejected the CTA's contention that, under the Act, "only the person who was injured may notify it and be furnished with a copy of section 41," finding that a written notice sent by claimant's attorney was sufficient. *High*, 345 Ill. App. 3d at 968, citing *Puszkarisk*, 322 Ill. App. 3d at 79.

The September 1, 2001 letter from plaintiff's counsel clearly was such a written communication, triggering the CTA's duty to send a copy of section 41 within 10 days of September 1. The CTA sent a copy of section 41 to plaintiff's counsel and argues that this complied with the Act, while plaintiff argues that the CTA could comply only by sending the copy to her personally. This court has previously determined that the CTA may send a copy of section 41 to a claimant's attorney when, as here, the attorney sent the written communication. *High*, 345 Ill. App. 3d at 968-69 (finding that any other interpretation of the statute would produce absurd results because a plaintiff could defeat the Act by simply having her attorney send a written communication of claimant's injury that did not include claimant's personal address). We therefore find that the CTA properly and timely sent a copy of section 41 to plaintiff's-counsel since plaintiff's counsel sent the written communication of injury.

Plaintiff next contends that section 41 of the Metropolitan Transit Act does not apply to wrongful death cases. We first note that plaintiff has waived her contentions that section 41 does not apply to wrongful death claims by failing to raise this issue at the trial level. *In re Liquidations of Reserve Ins Co.*, 122 Ill. 2d 555, 568 (1988).

Further, we note that plaintiff has waived her contentions that section 41 does not apply to wrongful death claims by conceding that section 41 applied to

the instant case at the trial level. "It is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding." *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 543 (1984). The rationale of this rule is obvious. It would be manifestly unfair to allow one party a second trial upon the basis of error, which he injected into the proceedings. *Auton*, 105 Ill. 2d at 543, quoting *Ervin v. Sears, Roebuck & Co.*, 65 Ill. 2d 140, 144, 2 Ill. Dec. 333, 357 N.E.2d 500 (1976); see also *People v. McAdrian*, 52 Ill. 2d 250, 254; 287 N.E.2d 688 (1972).

We nevertheless address plaintiffs contention that the section 41 notice requirements do not apply to wrongful death claims. On appeal, plaintiff argues that her cause of action for the wrongful death of her son should be governed by the Wrongful Death Act (740 ILCS 180/1 et seq.) and not the Metropolitan Transit Act (70 ILCS 3605/1 et seq.). The focus of our inquiry is whether the legislature intended the notice provisions of section 41 to apply to claims for wrongful death against the CTA.

"When construing a disputed statutory provision, the court's primary goal is to ascertain and give effect to the legislature's intent." *Fields*, 319 Ill. App. 3d at 687. "To determine the legislative intent, we first consider the statutory language." *Fields*, 319 Ill. App. 3d at 687. "A court should consider the reason and necessity for the law, the evils it was, intended to remedy and the objects and purposes to be obtained. *Puszkarska*, 322 Ill. App. 3d at 78. If the statutory language is clear, we need not look further to construe the statute. *Puszkarska*, 322 Ill. App. 3d at 78.

We first draw instruction from the language of the statute itself. Section 41 mandates that a plaintiff provide certain information to the CTA "within six (6) months from the date that such injury was received or such cause of action accrued *** ." 70 ILCS 3605/41 (West 2004). Among the information is (1) "the name of the person to whom the cause of action has accrued"and (2) "the name and residence of the person injured." 70 ILCS 3605/41 (West 2004). This leads us to the conclusion that the legislature intended for the section 41 notice requirements to apply to wrongful death actions when brought against the CTA. Otherwise, the two pieces of information would be superfluous as in simple personal injury actions or survival actions the name of the person (1) to whom the cause of action has accrued and (2) the name of the person injured would always be the same. See generally *Fetter v. Wood*, 211 Ill. App. 3d 70 (1991).

Our conclusion is supported by the principle that when confronted with two statutes of limitation that could apply to a case, we apply the statute that more specifically applies to the case at hand. *Tosado v. Miller*, 188 Ill. 2d 186, 191 (1999), citing *Zimmer v. Village of Willowbrook*, 242 Ill. App. 3d 437, 442 (1993).

The proper focus of the inquiry under the statutes at issue here should be on the nature of the defendant rather than on the type of action. See *Tosado*, 188 Ill. 2d at 191 (applying this analysis to determine that the Tort Immunity Act applied to defendants which were local public entities as opposed to section 13-212 of the Code of Civil Procedure). The legislature, when enacting section 41 of the Metropolitan Transit Act, intended to allow defendant to make a timely investigation into the facts surrounding an injury that

may give rise to a claim against the CTA. *Hinz*, 133 Ill. App. 2d at 645. In enacting the Metropolitan Transit Act the legislature focused on a particular defendant and granted the CTA greater protection than other defendants. By focusing on the nature of the defendant at issue in this case, it is clear that section 41 of the Metropolitan Transit Act is more specific than the Wrongful Death Act. We therefore find that the six-month notice provision applied to this case.

Finally, plaintiff argues that application of the section 41 notice requirements to the case at bar constitutes unconstitutional special legislation. We disagree.

Article 4, section 13, of the Illinois Constitution provides:

> "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." Ill. Const. 1970, art. IV, §13.

The special legislation clause prohibits the legislature from passing any local or special law granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever. *Schuman v Chicago Transit Authority*, 407 Ill. 313, 317 (1950). This provision supplements the equal-protection clause of the fourteenth amendment to the Federal constitution and prevents the enlargement of the rights of one or more persons in discrimination against the rights of others. *Schuman*; 407 Ill. at 317. The controlling question is whether the

classification of persons or objects for purposes of legislative regulation is based upon some substantial difference. bearing proper relation to the classification or, on the other hand, is arbitrary and capricious. *Schuman*, 407 Ill. at 317.

In *Schuman*, it was long ago. determined that a reasonable basis obtained for the classification made by the General Assembly in requiring that notice of an accident be given the CTA within six months and that actions for personal injuries be commenced within one year from the date the injury was received or the cause of action accrued. *Schuman*, 407 Ill. at 318. The rational basis for the enactment of the statute involved in this case is to allows the CTA, one of the largest transportation municipal corporations in the world, to make a timely investigation into the facts surrounding an injury that may give rise to a claim against it. *Hinz*, 133 Ill. App. 3d at 645. By forcing prospective claimants to give notice to defendant within six months from the time of their injury, the CTA is better able to locate the witnesses to the injury, and those witnesses are better able to recall the factors surrounding the injury. *Hinz*, 133 Ill. App. 3d at 645. This same rational basis applies to wrongful death claims against the CTA. The six-month notice provision allows the CTA to make a timely investigation into the facts surrounding an injury that may give rise to a claims against it.

It is true, as plaintiff contends, that there are more injuries than deaths on the CTA's transit lines every year. This, plaintiff argues, makes the application of section 41 to wrongful death cases unconstitutional, as the rational basis for the legislation evaporates when applied to wrongful death cases because the CTA is undoubtedly aware of a death that takes place on its

transit lines. However, this argument is in direct contradiction to our courts' section 41 jurisprudence, which holds that "the fact that the CTA had or could have obtained the correct information is irrelevant to the issue of whether notice was properly provided, as the CTA has no affirmative duty to obtain information that is missing from *** plaintiff's section 41 notice." *Curtis*, 341 Ill. App. 3d at 580.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County. We find that the plaintiff failed to file the statutorily mandated information with the secretary of the Board of the CTA within the applicable six-month period. We find that the CTA was not estopped from asserting section 41 as a defense to this action. We further find that section 41 of the Metropolitan Transit Act is applicable to wrongful death claims and that application of the section 41 notice requirements is not unconstitutional as applied to this case. Therefore, we find that the trial court did not err in dismissing plaintiff's complaint with prejudice, forever barring plaintiff from bringing the action against the CTA for failure to satisfy the notice provisions of section 41 of the Transit Act.

Affirmed.

R GORDON, J., with McBRIDE, P.J.,[2] and CAHILL, J., concurring.

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[2] After oral arguments were heard on April 25, 2007, Justice Garcia recused himself as a panel member. Presiding Justice McBride, after being substituted as a panel member on this case, has read the briefs and record and has listened to the tape of the oral arguments.

APPENDIX B

105237

SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

November 29, 2007

Mr. Robert P. Sheridan
Clifford Law Offices
120 N. LaSalle Street, 31st Floor
Chicago, IL 60602

No. 105237 — Diana S. Parker, as Adm'r., etc., petitioner, v. Chicago Transit Authority, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on January 4, 2008.

APPENDIX C

Order (43350124) **CCG N002-75M-10/8/04**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINIOIS

DIANA PARKER, Spec. Admin.	)	
v.	)	No. 05 L 0973
CHICAGO TRANSIT AUTHORITY	)	

ORDER

This matter coming before the Court on Defendant's Motion to Dismiss based on Section 41, due notice having been given,

IT IS hereby ordered

The motion is granted, Plaintiff's cause of action is dismissed, with prejudice.

ENTERED:

JUDGE LYNN H. EGAN

JUL 01 2005

APPENDIX D

ILLINOIS COMPILED STATUTES

Chapter 70. Special Districts
Transit
Metropolitan Transit Authority Act

§ 70 ILCS 3605/41. [Personal injury actions; limitations; statement required]

Sec. 41. No civil action shall be commenced in any court against the Authority by any person for any injury to his person unless it is commenced within one year from the date that the injury was received or the cause of action accrued. Within six (6) months from the date that such an injury was received or such cause of action accrued, any person who is about to commence any civil action in any court against the Authority for damages on account of any injury to his person shall file in the office of the secretary of the Board and also in the office of the General Counsel for the Authority either by himself, his agent, or attorney, a statement, in writing, signed by himself, his agent, or attorney, giving the name of the person to whom the cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, the place or location where the accident occurred and the name and address of the attending physician, if any. If the notice provided for by this section is not filed as provided, any such civil action commenced against the Authority shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from further suing.

Any person who notifies the Authority that he or she was injured or has a cause of action shall be furnished a copy of Section 41 of this Act. Within 10 days after being notified in writing, the Authority shall either send a copy by certified mail to the person at his or her last known address or hand deliver a copy to the person who shall acknowledge receipt by his or her signature. When the Authority is notified later than 6 months from the date the injury occurred or the cause of action arose, the Authority is not obligated to furnish a copy of Section 41 to the person. In the event the Authority fails to furnish a copy of Section 41 as provided in this Section, any action commenced against the Authority shall not be dismissed for failure to file a written notice as provided in this Section. Compliance with this Section shall be liberally construed in favor of the person required to file a written statement.